

# Appendix A

To Consent Decree

LAND COURT

REGULAR SYSTEM

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CARLSMITH BALL LLP  
Pacific Tower, Suite 2200  
1001 Bishop Street  
Honolulu, Hawaii 96813

Attention: Eric A. James  
Telephone: (808) 523-2500

TITLE OF DOCUMENT:

**DECLARATION OF ENVIRONMENTAL RESTRICTIONS (SOURCE AREA); JOINDER**

PARTIES TO DOCUMENT:

Declarant: **JAMES CAMPBELL COMPANY LLC**, a Delaware limited liability company  
The James Campbell Building, 1001 Kamokila Boulevard, Kapolei, Hawaii 96707

Joinder \_\_\_\_\_, a \_\_\_\_\_

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Region IX, 75 Hawthorne Street, San Francisco, California 94105

**DEL MONTE FRESH PRODUCE (HAWAII), INC.**, a Delaware corporation  
94-1000 Kunia Road, Kunia, Hawaii 96759

TAX MAP KEY(S): (Oahu) \_\_\_\_\_ (This document consists of \_\_\_\_\_ pages.)  
**Certificate of Title No.** \_\_\_\_\_

## DECLARATION OF ENVIRONMENTAL RESTRICTIONS (SOURCE AREA)

THIS DECLARATION OF ENVIRONMENTAL RESTRICTIONS (the "Declaration") is made as of \_\_\_\_\_, 200\_\_\_\_, by **JAMES CAMPBELL COMPANY LLC**, a Delaware limited liability company (the "**Declarant**"), whose address is the James Campbell Building, 1001 Kamokila Boulevard, Kapolei, Hawaii 96707, with reference to the following:

### STATEMENT OF FACTS

A. Declarant is fee owner of that certain real property located in Honolulu, Ewa, Oahu, State of Hawaii, known as Lot \_\_\_ and \_\_\_ as shown on Map \_\_\_ and \_\_\_, respectively, of Land Court Application \_\_\_, as noted on Transfer Certificate of Title Nos. \_\_\_\_\_ and \_\_\_\_\_ (together with the improvements thereon at any time, the "**Declarant Property**").

B. \_\_\_\_\_ ("**Lot** \_\_\_") is fee owner of that certain real property located in Honolulu, Ewa, Oahu, State of Hawaii, known as Lot \_\_\_ as shown on Map \_\_\_, of Land Court Application \_\_\_, as noted on Transfer Certificate of Title No. \_\_\_\_\_ (together with the improvements thereon at any time, the "**Lot** \_\_\_").

C. By that certain deed dated \_\_\_\_\_, 20\_\_ by and between Declarant and \_\_\_\_\_ filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. \_\_\_\_\_, Declarant conveyed Lot \_\_\_ to \_\_\_\_\_ subject to a reservation in favor of Declarant wherein Declarant reserved (i) the right to establish and maintain institutional controls over all or a portion of Lot \_\_\_, in form and content acceptable to the United States Environmental Protection Agency ("**EPA**"), without the joinder or consent of the then owner of Lot \_\_\_; and (ii) a right of access to and/or over Lot \_\_\_, in form and content acceptable to the EPA, without the joinder or consent of the then owner of Lot \_\_\_ (the Declarant Property and Lot \_\_\_ are hereinafter collectively referred to as the "**Source Area**")

D. Declarant and \_\_\_\_\_ currently lease the Source Area, together with other lands (collectively the "**Leased Lands**"), to Del Monte Fresh Produce (Hawaii), Inc, a Delaware corporation ("**Tenant**") under that certain unrecorded Amended and Restated Lease dated January 5, 1995, as amended ("**Lease**"), which has a term that expires December 31, 2008.

E. The EPA placed portions of the Leased Lands on the National Priorities List in December 1994, designating them as a "Superfund Site" referred to as the Del Monte Corporation (Oahu Plantation) Superfund Site.

F. The Tenant has entered into a consent decree with the EPA filed September 27, 2005 ("**Del Monte Consent Decree**") under which Tenant has agreed to perform certain response actions as provided therein. The contamination at the Source Area includes contamination of shallow ground water ("**Perched Aquifer**"), and soil contamination from approximately 20 feet below ground surface to 100 feet below ground surface ("**Deep Soils**").

G. As detailed in the Remedial Investigation ("**RI**") issued in November 1998 and the Feasibility Study ("**FS**") issued in February 2003 by the EPA and the Record of Decision issued on September 25, 2003 by the EPA ("**ROD**"), the Perched Aquifer and the Deep Soils contain the hazardous substances 1,2-dibromo-3-chloropropane ("**DBCP**"), ethylene dibromide ("**EDB**") and 1,2-dichloropropane ("**DCP**"). Pursuant to the Del Monte Consent Decree, and to implement

the Perched Aquifer and Deep Soils remedy selected by the EPA in the ROD ("**Remedy for the Perched Aquifer and Deep Soils**"), Tenant has installed a soil and vegetative cover (the "**Cap**") on the Source Area to prevent infiltration of rainwater and to prevent contact with contaminated soil. The Tenant has also installed, among other things, groundwater monitoring and extraction wells, a soil vapor extraction ("**SVE**") system and phytoremediation treatment units in the Source Area to remediate hazardous substances in the Perched Aquifer and Deep Soils. The Source Area also includes the groundwater treatment system installed by the Tenant to remediate deep (basal) groundwater.

H. Declarant has also entered into a Consent Decree with EPA filed \_\_\_\_\_ ("**Institutional Controls Consent Decree**") to satisfy a requirement of the ROD that certain institutional controls be placed on the Source Area as more fully set forth below. Pursuant to the Institutional Controls Consent Decree, Declarant is recording this Declaration as an encumbrance against the title to the Source Area.

I. Pursuant to the Institutional Controls Consent Decree, Declarant has also recorded as an encumbrance against the title to the Source Area the following: (i) that certain Declaration of Environmental Restrictions (Well Restriction Area); Joinder dated \_\_\_\_\_, 20\_\_\_\_, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. \_\_\_\_\_ ("**Well Restriction Declaration**"); and (ii) that certain Declaration of Site Access (Site); Joinder dated \_\_\_\_\_, 20\_\_\_\_, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. \_\_\_\_\_ ("**Site Access Declaration**").

#### **NOW, THEREFORE, DECLARANT PROVIDES AS FOLLOWS:**

##### **Section 1. HAWAII UNIFORM ENVIRONMENTAL COVENANTS ACT**

This Declaration is an environmental covenant executed pursuant to Hawaii Revised Statutes ch. \_\_\_\_ ("**UECA**"). For all purposes under UECA, Declarant shall be the "Holder" as such term is defined in the UECA. The administrative record for the Institutional Controls Consent Decree and reports required thereunder shall be held by the EPA at Region IX, 75 Hawthorne Street, San Francisco, California 94105. In accordance with §§ \_\_\_\_-7 and \_\_\_\_-8 of UECA: (i) this Declaration, and any amendment or termination thereof, shall be filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii; (ii) Declarant shall provide a copy of the filed Declaration, any amendment or termination thereof, and documentation of any other matters related to this Declaration to the Department of Health of the State of Hawaii; and (iii) Declarant shall provide a copy of this Declaration in the manner determined by the EPA to (a) each signatory of this Declaration; (b) each person holding a recorded interest in the Source Area; (c) each person in possession of the Source Area; (d) the City and County of Honolulu; and (e) any other person as determined by the EPA.

##### **Section 2. PROHIBITED USES AND ACTIVITIES.**

a. The Source Area shall not be: (a) used in any manner that causes a threat to public health; or (b) used or redeveloped for: (i) residential use; (ii) use as a hospital, school for people aged 21 years and under, or a day care center; or (iii) other uses by sensitive receptors, as defined by the EPA's risk assessment.

b. No owner, lessee, licensee or other occupant or user of the Source Area ("**Occupant**") shall undertake any construction in the Source Area that damages or interferes

with any equipment or other components of the basal groundwater treatment system or any components of the Remedy for the Perched Aquifer and Deep Soils including the vegetative soil cap, groundwater monitoring and extraction wells, conveyance pipelines, the soil vapor extraction system and the phytoremediation treatment units.

### **Section 3. RECORDATION OF SURVEY PLAT AND OTHER INFORMATION.**

The survey plat showing the location of the Cap on the Source Area has been filed with the City and County of Honolulu, Department of Permitting and Planning, the local authority with jurisdiction over local land use, and has been provided to and approved by the EPA in accordance with the Institutional Controls Consent Decree.

### **Section 4. ANNUAL REPORT.**

Under Section VII.D (Annual Report) of the Institutional Controls Consent Decree, Declarant is obligated to submit to the EPA for its review and approval, an Institutional Controls Consent Decree Annual Report ("**IC Annual Report**"), beginning on the first anniversary of the Effective Date of the Institutional Controls Consent Decree. Within thirty (30) days of receipt of a written request from the Declarant, the fee simple owner of the Source Area or a portion thereof, shall (i) summarize the activities such owner has undertaken in the previous year to comply with the requirements of this Declaration as to the Source Area or portion thereof owned by such owner, and (ii) certify such information to Declarant in the same manner as required of Declarant by the EPA, so as to enable Declarant to compile and provide the EPA with the information required for the IC Annual Report. To the extent that the EPA, after reviewing the IC Annual Report, requires additional information regarding compliance with the requirements of this Declaration as to any portion of the Source Area not then owned by Declarant, then the owner of such portion of the Source Area shall provide such information to Declarant in a timely fashion so as to enable Declarant to comply with the requirements of the Institutional Controls Consent Decree in a timely manner. If portions of the Source Area are owned by different owners, then this requirement shall apply to each such owner as to the property owned by them.

### **Section 5. INDEMNITY.**

Each Occupant shall Indemnify the Declarant from and against any and all claims and demands for loss or damage, arising out of or related to such Occupant's failure to comply with the requirements of this Declaration after the date of this Declaration. For the purposes of this Declaration, the term "**Indemnify**" means the protection of a party, by a money payment if necessary, against out-of-pocket loss. The term shall include an obligation by the indemnitor to defend and hold the indemnitee harmless (with counsel acceptable to the indemnitee) in connection with any claim against which the obligation to Indemnify operates. The obligation to Indemnify shall specifically include, but shall not be limited to payment of (or in the alternative, reimbursement of) all reasonable out of pocket costs and expenses paid by the indemnitee for the indemnitee's defense, including without limitation, reasonable attorneys' fees and costs, and all other consultants' reasonable fees and costs. The obligation to Indemnify shall also specifically include all reasonable out of pocket costs for research regarding settlement or other preventive measures undertaken by the indemnitee with regard to any such claim. The provisions of this Section 5 (Indemnity) shall survive the termination of this Declaration.

## **Section 6. ENFORCEMENT OF DECLARATION.**

The provisions of this Declaration can only be enforced by the EPA, Declarant and the persons, as such term is defined in the UECA, that are entitled to enforce an environmental covenant under § \_\_-11(a) of the UECA; provided that the EPA shall have primary responsibility for the enforcement of this Declaration. Upon and following Declarant's conveyance of the Source Area, or any portion thereof, to a successor in title, the successor in title and not Declarant shall be responsible for performing the obligations set forth herein as to the property conveyed, except that notwithstanding such conveyance, Declarant shall be responsible for seeking in good faith to enforce the provisions of this Declaration as to the properties so conveyed, to the extent that the EPA is unable, despite its good faith efforts, to enforce the provisions of this Declaration.

## **Section 7. COVENANTS RUN WITH THE LAND; NOTICE OF TRANSFER; PRIORITY.**

a. Covenants Run With Land. The restrictions set forth in this Declaration shall run with the Source Area and shall be binding on all Occupants having any interest in the Source Area or any portion thereof and their successors and assigns; provided, however, that such restrictions shall be binding on each Occupant, and their respective successors and assigns only for such period as they shall have title to or an interest in possession or occupancy of the Source Area or any portion thereof.

b. Notice Of Transfer. At least thirty (30) days prior to any conveyance or other transfer of a fee simple interest in the Source Area or portion thereof, the then fee simple owner of the Source Area or portion thereof shall (i) provide the successor owner of the Source Area or portion thereof with written notice of (a) the Institutional Controls Consent Decree; and (b) this Declaration; and (ii) provide to the Regional Administrator of the EPA, Region IX, written notice of the proposed conveyance or other transfer, and the name and address of the successor owner of the Source Area or portion thereof, and the date on which the notice set forth in subpart (i) of this sentence was given to the successor owner of the Source Area or portion thereof.

c. Priority. This Declaration shall be prior to any mortgage, deed of trust or other security recorded against the Source Area. However, the provisions of this Declaration do not limit the right of a security holder to foreclose or otherwise enforce any mortgage, deed of trust, or other encumbrance against the Source Area or the right of a security holder to pursue any remedies for the enforcement of any pledge or lien against the Source Area provided, however, that in the event of a foreclosure sale under any deed of trust, or other lien or encumbrance, or a sale pursuant to any power of sale contained in any such deed of trust, the purchaser or purchasers and their successors and assigns, and the Source Area shall be, and shall continue to be, subject to all of the conditions, restrictions and covenants provided for in this Declaration.

## **Section 8. MODIFICATION AND TERMINATION.**

a. Modification. If a successor in title of Declarant: (1) seeks a modification of the restrictions set forth in this Declaration as to its property including a modification to the boundaries of the Source Area; or (2) seeks to object to any modification or addition to such restrictions determined by EPA to be necessary under the Institutional Controls Consent Decree, such successor in title may request that Declarant request such a modification from the EPA (or object to such modification proposed by the EPA) pursuant to the Declarant's rights

under Section VIII (Modification of Institutional Controls) of the Institutional Controls Consent Decree. If Declarant, in its sole discretion, decides to seek such a modification from EPA (or to object to such a modification proposed by EPA), then the successor in title requesting such modification (or making such objection) shall pay all costs and expenses incurred by Declarant in requesting such modification from the EPA (or making such objection to EPA) and shall provide to Declarant financial assurances satisfactory to Declarant, in its sole discretion, that the successor in title has sufficient funds available to pay for such costs and expenses. Nothing contained herein shall be deemed or construed as a guarantee by Declarant that the EPA will approve such modification (or agree to such objection).

b. Termination. This Declaration will automatically terminate and be of no further force and effect upon:

(1) Certification of Completion of the Work by EPA pursuant to Paragraph 47 of Section XIV (Certification of Completion) of the Del Monte Fresh Produce (Hawaii), Inc. Consent Decree.

(2) The agreement of the Declarant, as the Holder, and the EPA to terminate this Declaration pursuant to § \_\_-10(a) of the UECA.

#### **Section 9. AMENDMENT OF DECLARATION.**

This Declaration, including any exhibit attached hereto, may be amended only by Declarant with the written consent of EPA but without the joinder of, or consent of any owner of the Source Area, in the following circumstances:

a. To incorporate any modifications approved by the EPA pursuant to Section VIII (Modification of Institutional Controls) of the Institutional Controls Consent Decree and Section 8.a (Modification), above.

b. To incorporate any additional restrictions imposed by the EPA pursuant to its rights under paragraph 15 (Additional Use Restrictions) and paragraph 28 (EPA Selection of Further Institutional Controls) of the Institutional Controls Consent Decree.

c. To incorporate any amendments by consent of the Declarant, as the Holder, and the EPA pursuant to § \_\_-10(a) of the UECA.

#### **Section 10. PROTECTION OF SUCCESSORS IN TITLE.**

As, and to the extent set forth in Section XVI (Covenants Not to Sue By Plaintiff) of the Institutional Controls Consent Decree, the United States of America has agreed not to sue or to take administrative action pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("**CERCLA**") against a successor in title of Declarant to the Source Area (other than a successor in title that otherwise is a responsible or potentially responsible party for the Source Area), provided that such successor in title satisfactorily performs its obligations as an Occupant as set forth in (i) this Declaration, (ii) the Well Restriction Declaration, and (iii) the Site Access Declaration.

## **Section 11. JOINDER.**

a. \_\_\_\_\_. By its joinder herein, \_\_\_\_\_ hereby consents to the recordation of the Declaration, acknowledges that Lot \_\_\_\_ is subject to the terms and provisions of the Declaration, and (i) agrees to be bound by the terms and provisions of this Declaration; and (ii) waives, in accordance with § \_\_\_\_-10(a)(3) and § \_\_\_\_-10(b) of the UECA, the right to consent to any amendments or termination of this Declaration.

b. EPA. By its joinder herein, EPA hereby consents to the recordation of the Declaration and hereby waives, in accordance with § \_\_\_\_-10(a)(2) of the UECA, any requirement under the UECA that the fee simple owner of the Source Area execute any amendments or termination of this Declaration.

c. Del Monte. Del Monte Fresh Produce (Hawaii), Inc., is the current lessee under the Lease, and hereby joins in this Declaration at the request of Declarant. By its joinder, Del Monte Fresh Produce (Hawaii), Inc. hereby consents to the recordation of the Declaration, acknowledges that its rights under the Lease are subordinate and subject to the terms and provisions of the Declaration, and (i) agrees to be bound by the terms and provisions of this Declaration; and (ii) waives, in accordance with § \_\_\_\_-10(a)(3) of the UECA, the right to consent to any amendments or termination of this Declaration, except for any amendments that relate or pertain to Del Monte Fresh Produce (Hawaii), Inc.'s duty of indemnity under this Declaration.

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IN WITNESS WHEREOF, Declarant, \_\_\_\_\_, EPA and Tenant have executed this Declaration as of the date first set forth above.

**JAMES CAMPBELL COMPANY LLC**

By \_\_\_\_\_  
Stephen H. MacMillan  
Its President and Chief Executive Officer

**Declarant**

**JOINDER**

\_\_\_\_\_, \_\_\_\_\_

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**EPA**

**DEL MONTE FRESH PRODUCE (HAWAII),  
INC.,**  
a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF HAWAII )  
 ) ss.  
CITY AND COUNTY OF HONOLULU )

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared **STEPHEN H. MacMILLAN**, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

Name: \_\_\_\_\_  
Notary Public, State of Hawaii  
My commission expires: \_\_\_\_\_

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me personally appeared \_\_\_\_\_, and \_\_\_\_\_, to me known to be the persons described in and who severally executed the foregoing instrument, and severally acknowledged that they executed the same as their free act and deed as such.

\_\_\_\_\_  
Name: \_\_\_\_\_  
Notary Public, State of \_\_\_\_\_  
My commission expires: \_\_\_\_\_

)

) SS.

)

Name: \_\_\_\_\_

My commission expires: \_\_\_\_\_

STATE OF HAWAII )  
 ) ss.  
CITY AND COUNTY OF HONOLULU )

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me personally appeared \_\_\_\_\_, and \_\_\_\_\_, to me known to be the persons described in and who severally executed the foregoing instrument, and severally acknowledged that they executed the same as their free act and deed as such.

\_\_\_\_\_  
Name: \_\_\_\_\_  
Notary Public, State of Hawaii  
My commission expires: \_\_\_\_\_